

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO.No.416/2005 & C.M. 17787/2005**

% *Reserved On: 20.12.2010*
Decided On: 06.01.2011

RAMESH CHANDER ARORA Appellant
Through: Mr. G.L. Rawal, Sr. Adv. with Mr.
Kuljeet Rawal, Adv.

Versus

KASHMIR SAREE KENDRA Respondent
Through: Mr. Sunil Lalwani, Adv.

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

- | | | |
|----|---|-----|
| 1. | Whether reporters of Local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

: **MOOL CHAND GARG, J.**

1. The present appeal has been filed to assail the order dated 5.10.2005 passed by the learned ADJ, whereby objections filed by the appellant against the arbitral award dated 9.11.2004 were dismissed.

2. The brief factual matrix of the case is as follows. That the appellant is a readymade garments exporter whereas the respondent is a fabric supplier. The appellant entered into a commercial transaction with the respondent for the supply of 25,000 meters of silk at the rate of Rs. 85/- per meter. The respondent supplied the goods through three bills to the appellant. Disputes arose between the parties primarily over the issue of supply of defective goods by the respondent and non-payment of bills of the goods. I will not go into the details of the dispute for the sake of brevity but focus on the main issue.

3. It is the stand of the appellant that neither there was any arbitration agreement between the parties nor the claim of the respondent was within limitation, despite that the Arbitrator has allowed the claim of the appellant and in this manner has mis-conducted the proceedings and therefore, the said proceedings are

liable to be set aside. However, the learned ADJ has simply brushed aside the legal issue i.e. there being no arbitration agreement between the parties and the claim filed by the respondent being beyond limitation despite specific objection taken about it by the appellants in having filed an application under Section 16 of the Arbitration and Conciliation Act, 1994.

4. To appreciate the aforesaid contention of the appellant, I may observe that out of the three bills on which reliance has been placed upon by the respondent to contend that there was an arbitration clause, as far as the bill dated 15.1.2000 is considered, it does not contain any clause that the disputes will be decided by way of arbitration. As far as the other two bills are concerned, even though these have a clause printed on the back of it, **it does not reflect any agreement between the parties that the disputes will be decided subject to a decision of the Delhi Hindustani Mercantile Association by way of an arbitration.** The said clause reads as under:-

“clause 3: All the disputes will be decided by Delhi Mercantile Association as well as Courts within Delhi.”

5. The claim has been lodged by the respondent on 7.02.2003. Thus, the claim was barred by limitation yet the Arbitrator before whom also a specific objection regarding limitation was taken up by moving an application under Section 16 of the Arbitration and Conciliation Act on the point of limitation, has given no decision on the aforesaid application even though the Ld. Arbitrator heard the application and deferred it to be decided along with the judgment of the claim petition and he gave the arbitral award dated 9.11.2004 in the favour of the respondent whereby an amount of ₹4,91,046.43 as principal amount and ₹4,42,500 as interest at the rate of 18 percent till 18.08.2003 and ₹10,000/- as costs of Suit totaling to ₹9,43,546.43 has been awarded.

6. After the award was passed the appellant filed objections against the award dated 9.11.2004 objecting to the jurisdiction of the Arbitrator and also on account of limitation. The Ld. ADJ framed the following issues:-

1. Whether there exists any arbitration agreement between the claimant and the respondent?
2. Whether the claimant is a registered Partnership firm? If not, what is its effect on the present case?
3. Whether the claim of the claimant is within limitation?
4. Whether the claimant is entitled to recover the claim amount including the interest and cost from the respondent. if yes, interest at what rate?

7. Objections have been disposed of by making following observations:-

“8. The other objection with regard to the jurisdiction and limitation have also been dealt by the arbitrator. The arbitrator was of the view that there is a printed clause on the bill no.1 and 2 which says that the dispute shall be subject matter of the arbitration of the Delhi Hindustani Mercantile Association. So far the bill no.3 is concerned, that was the part of the continuous transaction between the respondent no.1 and the petitioner and the same could also be dealt under the arbitration along with the other bills being a part of the continuous transactions between the parties. The objection raised by the objector that the claim against the bill no.1 is barred by limitation is also without any basis. The Ld. Arbitrator has also categorically dealt with this aspect. Admittedly, the respondent no.1 has made the payment of Rs. 25,000/- as the part of payment of the transactions which brings the claim of the respondent no.1 within the period of limitation. In brief, the objection raised by the petitioner against the award of the arbitrator are without any basis and not supported by any factual or legal standard.

9. Consequently, I do not find any substance in the objections and I am of the considered opinion that there is no ground made out for set-aside the award dated 9.11.2004. The issue is accordingly decided against the object/petitioner.”

8. To appreciate the averments made by the appellant whereby they have objected to not only the arbitration of Delhi Hindustani Mercantile Association: the respondent firm being not a registered partnership firm and the claim petition being hopelessly time barred. The averments made in paragraph 8 of the appeal are reproduced hereunder for the sake of reference:-

“8. Appellant submits that after the said arbitration proceedings were thrust upon the appellant who contested the said proceedings by filing written statement

thereof. In nutshell appellant agitated before the so-called Arbitrator to the following:-

- i) That the claimant firm is not a registered partnership firm and Shri Ghulam Qadir is not one of the registered partner of the alleged firm, hence claim is not maintainable.
- ii) Claim petition is hopelessly time barred.
- iii) Claim petition is not maintainable in view of the fact that the Tribunal did not have jurisdiction to entertain and/or to try the subject dispute between parties. There was no valid or existing claim clause between the parties as, never any such Agreement was executed between the parties containing arbitration clause.
- iv) Without prejudice and alternate it was submitted that there is no appointment of Arbitrator as per law and reference thereof as not as per the requirements thereof.”

9. To appreciate the averments made on behalf of the appellant, I have already referred to the relevant arbitration clause relied upon by the respondents printed on the back of the two bills i.e. clause 3 in paragraph 4 above. A bare reading of the relevant clause reflects that the printed term does not require the disputes to be referred to for arbitration to Delhi Hindustani Mercantile Association but only refers to Delhi Mercantile Association.

10. Now coming to the second plea of the appellant that they had raised specific objections with regard to the arbitrability of the disputes by the aforesaid Association by writing a letter copy of which has been annexed along with the appeal as Annexure 2 available at page 32 reads as under:

“To,
Delhi Hindustani Merkentile
Association,
1210/16, Chandni Chowk,
Delhi-110006.

Sub:- Your Letter dated 13.02.2003
Ref: No.306/2002-03.

D/Sir

In this connection we are sorry to state that we can't take cognizance of above mentioned letter as we are not subject to jurisdiction any association by the name of “Delhi

Hindustani Markentile Association” 1210/16, Chandni Chowk, Delhi-6.

Kindly note that our terms of contract entered between Kashmir Saree Kendra & us was very clear on the point that no arbitrator without the mutual consent of both the parties will be appointed and no reference can be made for arbitration unilaterally. Kindly let us know our consent letter or signed agreement on this account.

In any case we append below various reminders sent to Kashmir Sarees Kendra for your information and records.

Thanking you,
Yours Faithfully
For Rachna Exports.”

11. The original of the aforesaid letter is available on record of the Arbitrator and a reference thereof also finds mention in the ordersheet of the Arbitrator dated 27.05.2003 except that there is no disposal of the aforesaid objection by the Arbitrator in the award.

12. As far as the issue of the respondent-firm being not a registered partnership firm, there is nothing on record which may take away this objection. Even the Arbitrator has also not repelled this objection. The arbitrator has only tried to say that for a dispute being referred to Mercantile Association, it is not necessary that the partnership firm should be registered under the Partnership Act.

13. To explain as to how the claim of the respondent was time barred, the appellant has referred to claim petition filed before the Arbtrator. It is shown that in the said claim, the claimant themselves have referred to three separate claim, i.e., claim No.1, Claim No.2 and Claim No.3. The details of those claims, as mentioned at page 4 of the claim is as follows:-

1.	Claim No.1	₹4,54,070.00
2.	Claim No.2	₹ 13,882.68
3.	Claim No.3	₹ 23,093.75

		₹4,91,046.43

14. Now coming to claim No.3, further details by the respondent is as follows:

“The respondent further supplied 506.25 meter of silk @ ₹95/- per meter vide Bill No.1137 dated 15.01.2000 and the sale price comes to ₹48,093.15 and out of this amount the respondent paid only ₹25,000/- to the claimant and thus, an amount of ₹23,095.75 is outstanding against the respondent.

15. This goes to show that the third bill dated 15.01.2000 was for a sum of ₹48,093.15 and out of the aforesaid amount the respondent adjusted a sum of ₹25,000/- towards the aforesaid bill which was paid by the appellant on 07.02.2007 and debited the balance of rs.23,095.75 as the amount payable with respect to Claim No.3 as stated above.

16. According to the appellant this goes to show that the three claims were being dealt separately by the respondents themselves. The first claim which was regarding supply of 25000 meters of silk, supplies were made till 21.07.1997 and in this regard, the bill which was left payable by the appellant as on 07.08.1997 was to the tune of ₹4,54,070/-. Whereas with respect to the second claim, out of the order of 2200 meters of silk, the order was complied with by the respondent as per Bill No.5721 and 5728 and out of the aforesaid amount only a sum of ₹12,882.68 was due and payable by the appellant to the respondent. Obviously, these two bills are prior to raising of the third claim which pertains to Bill No.1137 dated 15.01.2000. Thus, it is the case of the appellant that all the claims of the respondent were prior to 15.01.2000 and, therefore, raising a dispute on 16.02.2003 makes the entire claim barred by limitation. It is submitted that the effort made on the part of the respondent to bring the entire claim within limitation on the basis of a receipt of a sum of ₹25,000/- which they themselves have adjusted towards the payment of the third bill and not towards the payment of the entire outstanding amount is not sustainable in law so as to bring the entire claim within limitation.

17. It is thus, pleaded that before the Arbitrator also it was the case of the appellant that not only the arbitrator had no jurisdiction to try the dispute between the parties, the claim of the respondent was also barred by limitation.

18. My attention has also been drawn by the learned counsel for the appellant to the written statement filed by them before the Arbitrator. In this written statement also specific objections have been taken with respect to all the three aspects inasmuch as in preliminary objections No.1, the plea of the respondent-firm being not registered as a partnership firm has been taken; in preliminary objection No.2, issue of limitation has been specifically taken while in preliminary objections No.3, the issue with regard to the jurisdiction of the Arbitration Tribunal/Mercantile Association has been taken. Despite all these specific objections, perusal of the record goes to show that the Arbitrator has brushed aside all the aforesaid three objections.

19. I have gone through the award given by the Arbitrator. In the award various issues raised by the appellant stands mentioned as issues. However, while dealing with the first objection regarding the Arbitral Forum as mentioned on the back of the two bills being Delhi Mercantile Association: it has simply been mentioned that in the bills of claim there is a mention of Delhi Hindustani Mercantile Association (Regd.), which is contrary to record. None of such bill which contain the terms and conditions that the disputes will be referred to Delhi Hindustani Mercantile Association is available on the arbitration record rather the bills of which mention has been made by the appellant before this Court, there is a mention of only Delhi Mercantile Association and not Delhi Hindustani Mercantile Association. As far as the arbitration record is concerned, only photocopies of the bills are available which do not have the back of the bills.

20. As regards the second objection regarding registration of the partnership firm being not there, the Arbitrator has simply stated that the said registration is not required as per the rules of Delhi Hindustani Mercantile Association. Such rules which are contrary to law cannot be taken cognizance of. In this regard we may refer to Section 69 of the Indian Partnership Act, 1932 which reads as under:

“69. EFFECT OF NON-REGISTRATION.-

(1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on a behalf of any persons suing as a partner in a firm against the firm or any person alleged to be or to have been a

partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm:

Provided that the requirement of registration of firm under this sub-section shall not apply to the suits or proceedings instituted by the heirs or legal representatives of the deceased partner of a firm for accounts of the firm or to realise the property of the firm.

(2) No suit to enforce a right arising from a contract shall be instituted in any court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(2A) No suit to enforce any right for the dissolution of a firm or for accounts of a dissolved firm or any right or power to realise the property of a dissolved firm shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or have been a partner in the firm, unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm:

Provided that the requirement of registration of firm under this sub-section shall not apply to the suits or proceedings instituted by the heirs or legal representatives of the deceased partner of a firm for accounts of a dissolved firm or to realise the property of a dissolved firm.

(3) The provisions of sub-sections (1), (2) and (2A) shall apply also to a claim of set-off or other proceedings to enforce a right arising from a contract but shall not affect

(a) the firms constituted for a duration upto six months or with a capital upto two thousand rupees;
or;

(b) the powers of an official assigned, receiver or Court under the Presidency Towns Insolvency Act, 1909, or the Provincial Insolvency Act, 1920, to realise the property of an insolvent partner.

(4) This section shall not apply

(a) to firms or partners in firm which have no place of business in the territories to which this Act extends, or

whose places of business in the said territories are situated in areas to which, by notification under section 56 this Chapter does not apply, or

(b) to any suit or claim of set-off not exceeding one hundred rupees in value which, in the presidency towns, is not of a kind specified in section 19 of the Presidency Small Cause Courts Act, 1882, or outside the Presidency towns, is not of a kind specified in the Second Schedule to the Provincial Small Cause Courts Act, 1887, or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim.”

21. Now coming to the objection of the appellant with regard to plea of limitation, I find that the Arbitrator has ignored the claim of the respondent itself who have adjusted a sum of ₹25,000/- only in the third bill and not in account because no running account has been placed on record which may go to show that the adjustment was in a running account. Moreover, the third bill was subject to Srinagar jurisdiction.

22. All these objections which were raised by the appellant before the Arbitrator as also before the learned ADJ were legal objections and go to show that the award given by the Arbitrator was contrary to law and thus, comes in the ambit of being violative of public policy which is a ground to raise such objections under Section 34(2)(b) of the Arbitration and Conciliation Act, 1996 which reads as under:

“34. Application for setting aside arbitral award.-

1. xxxxxx
2. An arbitral award may be set aside by the Court only if—
 - (a) xxxxxx
 - (b) the Court finds that—
 - (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
 - (ii) the arbitral award is in conflict with the public policy of India.”

23. As far as public policy and its interpretation is concerned, the law is now well settled. The Supreme Court in the case of in the case of

ONGC VS. SAWPIPES, 2003 (5) SCC 705. has been pleased to interpret as follows:-

“WHAT MEANING COULD BE ASSIGNED TO THE PHRASE 'PUBLIC POLICY OF INDIA'?

16. The next clause which requires interpretation is Clause (ii) of Sub-section 2(b) of Section 34 which inter alia provides that the Court may set aside arbitral award if it is in conflict with the 'Public Policy of India'. The phrase 'Public Policy of India' is not defined under the Act. Hence, the said term is required to be given meaning in context and also considering the purpose of the section and scheme of the Act. It has been repeatedly stated by various authorities that the expression 'public policy' does not admit of precise definition and may vary from generation to generation and from time to time. Hence, the concept 'public policy' is considered to be vague, susceptible to narrow or wider meaning depending upon the context in which it is used. Lacking precedent the Court has to give its meaning in the light and principles underlying the Arbitration Act, Contract Act and Constitutional provisions.

17. For this purpose, we would refer to few decisions referred to by the learned counsel for the parties. While dealing with the concept of public policy, this Court in ***Central Inland Water Transport Corporation Limited and Anr. v. Brojo Nath Ganguly and Anr.*** (1986)IILLJ171SC has observed thus:--

"92. The Indian Contract Act does not define the expression "public policy" or "opposed to public policy". From the very nature of things, the expressions "public policy", "opposed to public policy", or "contrary to public policy" are incapable of precise definition. Public policy, however, is not the policy of a particular government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and similarly where there has been a well recognised head of public policy, the courts have not shirked from extending it to the new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy. ***There are two schools of thought -- "the narrow view" school and "the broad view" school.*** According to the

former, courts cannot create new heads of public policy whereas the latter countenances judicial law-making in this area. The adherents of the "the narrow view" school would not invalidate a contract on the ground of public policy unless that particular ground had been well-established by authorities. Hardly ever has the voice of the timorous spoken more clearly and loudly than in these words of Lord Davey in *Janson v. Driefontein Consolidated Gold Mines Ltd.* (1902) AC 484: "**Public Policy is always an unsafe and treacherous ground for legal decision**". That was in the year 1902. Seventy-eight years earlier, Burrough, J., in *Richardson v. Mellish* (1824) 2 Bing 229 described public policy as "a very unruly horse, and when once you get astride it you never know where it will carry you." The Master of the Rolls Lord Denning, however, was not a man to shy away from unmanageable horse and in words which conjure up before our eyes the picture of the young Alexander the Great laming Bucephalus, he said in *Enderby Town Football Club Ltd. v. Football Assn. Ltd.* (1971) Ch. 591; "with a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles". Had the timorous always held the field, not only the doctrine of public policy but even the Common Law or the principles of Equity would never have evolved. Sir William Holdsworth in his "*History of English Law*", Volume III, page 55, has said:

In fact, a body of law like the common law, which has grown up gradually with the growth of the nation. necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises seek to weaken or negative them.

It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience. and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution.

93. The normal rule of Common Law has been that a party who seeks to enforce an agreement which is opposed to public policy will be non-suited. The case of *A. Schroeder Music Public Co. Ltd. v. Macaulay* (1974) 1 WLR 1308, however, establishes that where a contract is vitiated as being contrary to public policy, the party adversely affected by it can sue to have it declared void. The case may be different where the purpose of the contract is illegal or immoral. In *Kedar Nath Motani v. Prahlad Rai* [1960]1SCR861, reversing the High Court and restoring the decree passed by the trial court declaring the appellants' title to the lands in suit and directing the respondents who were the appellants' benamidars to restore possession, this Court, after discussing the English and Indian law on the subject, said (at page 873):

The correct position in law, in our opinion, is that what one has to see is whether the illegality goes so much to the root of the matter the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered. If the illegality be trivial or venial, as stated by Williston and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant should not be allowed to take advantage of the position. A strict view, of course, must be taken of the plaintiff's conduct, and he should not be allowed to circumvent the illegality by resorting to some subterfuge or by misstating the facts. If, however, the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose was achieved. then, unless it be of such a gross nature as to outrage the conscience of the court, the plea of the defendant should not prevail.

94. The type of contract to which the principle formulated by us above applies are not contracts which are tainted with illegality but are contracts which contain terms which are so unfair and unreasonable that they shock the conscience of the court. They are opposed to public policy and require to be adjudged void.”

24. The violation of the statutory provision which in this case involves violation of Section 16 of the Arbitration and Conciliation Act, 1996; violation of Section 69 of the Partnership Act as well as violation of Limitation Act, establishes that the award given by the Arbitrator was contrary to law and thus, against public policy. However, learned

ADJ has not taken note of any of these objections while deciding the objections vide impugned order against which the appellant has come in appeal before this Court.

25. A bare perusal of the aforesaid shows that neither the issue of there being no arbitration clause as specifically alleged by the appellant has been discussed by the ADJ in the impugned order, nor it has been discussed by the arbitrator. Similarly, the issue of limitation has also not been discussed. In these circumstances, the order of the ADJ cannot be sustained. Consequently, the award given by the Arbitrator is also set aside. Appeal is allowed with no order as to costs.

C.M. 17787/2005(stay)

Interim orders are made absolute.

The application is disposed of.

MOOL CHAND GARG,J

JANUARY 06, 2011

'anb'